Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In The Matter of	)
Notice of Inquiry Concerning a Review of the Equal Access and Nondiscrimination Obligations Applicable to Local Exchange Carriers	**CC Docket No. 02-39**

REPLY COMMENTS OF THE ASSOCIATION OF COMMUNICATIONS ENTERPRISES

The Association of Communications Enterprises ("ASCENT"), through undersigned counsel and pursuant to Section 1.430 of the Commission's Rules, 47 C.F.R.§ 1.430, hereby responds to comments submitted by BellSouth Corporation ("BellSouth"), SBC Communications Inc. ("SBC"), and the Verizon telephone companies ("Verizon") (collectively, the "BOC Commenters") in response to the *Notice of Inquiry*, FCC 02-57, released February 28, 2002, in the captioned proceeding ("*NOI*"). In the *NOI*, the Commission asked interested parties to address "the existing equal access and nondiscrimination obligations of Bell Operating Companies (BOCs), both with and without section 271 authority, . . . incumbent independent local exchange carriers (LECs) and competitive LECs," as well as to suggest "what the equal access and nondiscrimination obligations of all these carriers should be, considering the many legal and marketplace changes that have transpired since the earlier requirements were adopted."[1] The BOC Commenters urge the Commission to eliminate all of the equal access and nondiscrimination obligations left in place by Section 251(g) of the Communications Act of 1934, as amended by the Telecommunications Act

[1] NOI, FCC 02-57 at ¶ 1.

of 1996, 47 U.S. C. § 251(g), arguing that such safeguards are unnecessary and/or redundant.

The principal rationale voiced by the BOC Commenters for eliminating the Section 251(g) equal access and nondiscrimination obligations is that changes in the competitive landscape have rendered such safeguards unnecessary. According to the BOC Commenters, given the elimination of the monopoly local exchange franchises they held prior to the enactment of the Telecommunications Act of 1996 and the subsequent entry of competitors into the local exchange/exchange access market, these safeguards no longer serve any purpose, and, indeed, distort competition by preventing BOCs that have been authorized to provide in-region, interLATA service from competing on an equal basis.[2] Saying it doesn't make it so.

[2] Comments of BellSouth at 4; Comments of SBC at 2; Comments of Verizon at .2

Incumbent LECs continue to serve in excess of ninety percent of all access lines and to control the facilities necessary for connectivity to even a higher percentage of customers. Control of bottleneck facilities and an overwhelming market share allow incumbent LECs to dominate the local exchange/exchange access market.[3] And such domination translates into the ability to discriminate against competitors, and the prospect of grant, or the actual grant, of authority under Section 271, 47 U.S.C. § 271, provides strong incentive for incumbent LECs to exercise that ability.[4] The suggestion that an incumbent LEC's ability to leverage its control of bottleneck facilities and market share to disadvantage interexchange carrier ("IXC") rivals evaporates simply because a market is deemed open to competition and competitors have established a "toe hold" in that market, primarily through use of facilities leased from the incumbent LEC, is ludicrous on its face.

Even more ludicrous is the BOC Commenters' claim that existing equal access and

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[3] Policy and Rules Concerning Rates for Competitive Common Carrier Services and Facilities Authorizations Therefor (First Report and Order), 85 F.C.C.2d 1, ¶¶ 62 - 63 (1980) (*subsequent history omitted*).

[4] United States v. Western Electric Co., 673 F.Supp. 525, 536 (D.D.C. 1987) (*subsequent history omitted*); Implementation of the Non-Accounting Safeguards of Sections 271 and 272 of the Communications Act of 1934 (First Report and Order), 11 FCC Rcd. 21905, ¶¶ 10 - 12 (1996) (*subsequent history omitted).*

nondiscrimination obligations prevent them from competing effectively.[5] One need only look to the dramatic accumulation of market share by BOCs in states in which in-region, interLATA authority has been granted to appreciate the absurdity of this contention.[6] Incumbent LECs possess a massive marketing advantage over their IXC rivals by virtue of their provision of local exchange service to the large preponderance of customers. Equal access and nondiscrimination obligations have not been adequate to blunt this advantage, much less to hobble incumbent LEC marketing efforts.

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[5] Comments of BellSouth at 4; Comments of SBC at 1

[6] *See, e.g.,* Verizon 2001 Annual Report.

But, the Incumbent LEC Commenters retort, the Modification of Final Judgement's ("MFJ") equal access and nondiscrimination obligations were never intended to address such matters; indeed, they were designed only "to make sure that the divestiture really had its intended effect -- to make sure that the BOCs did not continue to discriminate in favor of their former parent, AT&T."[7] Certainly, according to the BOC Commenters, the MFJ equal access and nondiscrimination obligations had "nothing whatsoever to do with a BOC's marketing of interexchange services."[8] As SBC acknowledges, however, "[a]lthough the MFJ by its terms and original intent specifically proscribed discrimination *in favor of AT&T*, the MFJ court applied the MFJ so as to prohibit discrimination in favor of *any* carrier or provider."[9] And as the Commission has recognized, "underlying the BOCs' equal access and nondiscrimination obligations" is "a principle of non-favoritism."[10]

No more meritorious is the BOC Commenters' assertion that the equal access and nondiscrimination obligations are redundant.[11] SBC itemizes the myriad equal access and nondiscrimination obligations preserved by Section 251(g), noting that the lengthy list of MFJ requirements have been supplemented by a "complex web of regulations . . . relating to equal access

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[7] Comments of Verizon at 6.

[8] Id.

[9] Comments of SBC at 4 (emphasis in original).

[10] AT&T Corporation, et al. V. Ameritech Corporation and Qwest Communications Corporation (Memorandum Opinion and Order), 13 FCC Rcd. 21438, ¶ 55 (1998) (*subsequent history omitted*).

[11] Comments of BellSouth at 5; Comments of SBC at 6.

and nondiscriminatory interconnection" promulgated by the Commission over the years.[12] The carrier then, however, declares that because "[s]ections 201, 202, 203, 251(b)(3), and 272(c) already give the Commission ample authority to address . . . [such] matters [as 'nondiscriminatory interconnection requirements, tariffing, and dialing parity requirements']" no Commission action is necessary under Section 251(g).[13]

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[12] Comments of SBC at 3 - 6.

[13] Id. at 7.

SBC misses the point of the Congressional mandate embodied in Section 251(g). Section 251(g) requires the Commission to "prescribe regulations" which will "explicitly supercede[]" existing "equal access and nondiscriminatory interconnection restrictions and obligations," and when doing so to "explicitly identify those parts of the interim restrictions and obligations that it . . . [was] superceding."[14] This mandate is not met by simply declaring that certain equal access and nondiscrimination obligations could be promulgated under other sections of the Communications Act. Because Section 251(g) does not constitute a separate grant of authority to the Commission, any superceding regulations must, by necessity, be promulgated pursuant to authority granted the Commission elsewhere in the Communications Act.[15] Of course, existing equal access and nondiscrimination obligations not superceded by new regulations remain in effect in accordance with Section 251(g).

Turning to key equal access and nondiscrimination requirements, the Incumbent LEC Commenters opine that the Commission should refrain altogether from regulating incumbent LEC marketing of toll services, eliminating any requirement to inform new local exchange customers that toll service is available from other carriers, leaving incumbent LECs free to offer customers bundled service offerings without offering such packages in conjunction with unaffiliated IXCs, and to tenter into "teaming" arrangements which prefer one IXC over others.[16]

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[14] S. Conf. Rep. No. 104-230, 104th Cong., 2d Sess. 123 (1996).

[15] AT&T Corp. v. Iowa Utilities Board, 525 U.S. 366, 381, fn. 9 (1999).

[16] Comments of BellSouth at 5; Comments of SBC at 6 - 14; Comments of Verizon at 11 - 18.

Initially, Verizon is incorrect in its assertion that "Section 251(g) does not bear on the way a Bell company may market interLATA service," such matters being addressed by Section 272 alone.[17] The MFJ was to be "construed broadly to encompass all potential areas of favoritism,"[18] reflecting a broadly articulated "principle of non-favoritism underlying the BOC's equal access and nondiscrimination obligations."[19] Hence, marketing, like all other "potential areas of favoritism," are reached by existing equal access and nondiscrimination obligations. Under the MFJ, "BOCs may not favor an interexchange carrier by endorsing or promoting the services of one interexchange carrier over another."[20]

As to the BOC Commenters' argument that all scripting requirements should be eliminated, the marketing advantages that underlying the BOCs' dramatic accumulation of market share in states in which in-region, interLATA authority has been granted belie claims that the obligation to make consumers aware of the availability of other IXCs are unnecessary. Indeed, this dramatic accumulation of market share argues strongly for expansion of such obligations to

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[17] Comments of Verizon at 11.

[18] United States v. American Telephone and Telegraph Company, 552 F. Supp. 131, 142 (D.D.C. 1982) (*subsequent history omitted*).

[19] AT&T Corporation, et al. V. Ameritech Corporation and Qwest Communications Corporation (Memorandum Opinion and Order), 13 FCC Rcd. 21438 at ¶ 55.

[20] Id. at ¶ 57.

encompass the entire "LEC connect" channel.

Other BOC Commenter arguments that the Commission's construction of Section 251(g) is unduly narrow and that its prohibition of "teaming" arrangements is unduly broad can be summarily dismissed. If the term "marketing and sales" were to be expanded, as suggested by SBC, to encompass such activities as "product planning, design, and development," the nondiscrimination requirements of Section 272(c) would be in large measure eviscerated. Any activity associated with a service would arguably fall under "marketing and sales" under such a broad reading. Likewise, allowing any "teaming" arrangement so long as "the BOC is not performing impermissible functions and is clearly identifying the carrier of long distance,"[21] would, despite SBC's protestations to the contrary, not only allow a BOC to circumvent Section 271, but would gut the principle of non-favoritism underlying Section 251(g).

By reason of the foregoing, the Association of Communications Enterprises once again urges the Commission, consistent with these comments, to restate and expand the existing equal access and nondiscrimination obligations of the former Bell Operating Companies and other incumbent local exchange carriers.

Respectfully submitted,

ASSOCIATION OF COMMUNICATIONS ENTERPRISES

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[21] Comments of SBC at 13.

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